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No. 06-1010

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NIAGARA MOHAWK POWER CORPORATION, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENTS

Petitioners' corporate disclosure statements are included at Pet. (ii)-(iii).

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INTRODUCTION

Contrary to the impression created by the opposition of the Federal Energy Regulatory Commission ("FERC"), the fundamental issue presented in this case is *not* whether FERC "acted lawfully" in exercising some established authority to regulate sales of electricity used for "'station power' consumption" by electric power generators. Opp. (I); *id.* at 8, 12, 14. As the petitions (in this case and No. 06-1011) make clear, and as emphasized by *amici* National Association of Regulatory Utility Commissioners ("NARUC") and numerous States, the real issue is whether FERC has *any* authority or jurisdiction over such sales, given Congress' clear directive that *all* retail sales of electricity are within the exclusive jurisdiction of the States. On that central point, as the Court of Appeals euphemistically put it, the "jurisdictional rationale" advanced by FERC in the underlying decision "is a bit confusing." Pet. App. 9a.

Rather than attempt to clear up the confusion, FERC now attempts to change the subject. As we now show, however, FERC's various arguments do nothing to undermine the three reasons, explained in the petitions and the NARUC/State *amicus* brief, why this Court's resolution of the jurisdictional issue is amply warranted and urgently needed: First, the Court of Appeals' decision represents an enormous encroachment upon the States' authority that is contrary to the controlling statutes and decisions of this Court. Second, the Court of Appeals' reliance upon supposed concessions as a basis for finding jurisdiction conflicts with this Court's precedents and with decisions of other federal and state appellate courts. Moreover, contrary to FERC's suggestion, the existence of those alleged concessions only enhances the suitability of this case as a vehicle for resolving the underlying jurisdictional issue. Third, the Court of Appeals' decision to find jurisdiction while acknowledging that the agency itself had not established a sufficient basis conflicts with this

Court's precedents and presents essentially the same issue as the pending *Defenders of Wildlife* cases.

ARGUMENT

I. The Issue Of The Commission's Jurisdiction Over Station Power Warrants Plenary Review Or, At A Minimum, A Hold Pending Decision In The *Defenders of Wildlife* Cases.

A. The Court of Appeals' decision is a significant and unwarranted encroachment upon the States' police power, which Congress has expressly protected in the Federal Power Act, and a flat violation of this Court's decision in *New York* v. *FERC*.

To the extent FERC's present arguments have anything to do with the jurisdictional question presented here, most of them are, at bottom, attempts to provide an alternative basis for the Court of Appeals' jurisdictional holding. That holding cannot be justified, however, on any of the alternative grounds suggested in FERC's opposition. A close analysis of those arguments simply reconfirms that the FERC orders under review here represent an unwarranted encroachment upon the States' authority over retail rates.

1. Although FERC incorrectly claims (at 13-14) that the electricity *distribution* used to provide station power is properly considered interstate transmission rather than local distribution,[1] FERC does not dispute that the electrical *power*

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[1] This claim is incorrect because FERC acknowledged in the order affirmed in *New York v. FERC* that every delivery of electricity to an end-user involves "local distribution service" subject to the State's jurisdiction, regardless of the facilities involved. *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order 888, FERC Stats. & Regs. ¶ 31,036, at 31,783-84 & n.550 (1996), *order on reh'g*, Order 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order 888-B, 81 FERC

supplied by third parties in station power transactions represents a retail transaction rather than a wholesale transaction. *See* Pet. 6-7; Pet. App. 315a. Indeed, in one of the decisions under review here, FERC admitted that "third-party provision of station power is . . . not within our jurisdiction as it is a sale for end-use" (Pet. App. 315a) – that is, it is a retail sale. FERC's decisions under review here are, therefore, highly significant because they represent the first time that FERC has regulated retail sales (as opposed to transmission) of electricity, despite FERC's repeated admission (*e.g.*, FERC Opp. at 11) that "local distribution service and retail sales" are within the exclusive jurisdiction of the States.

Those admissions, moreover, amount to a concession that FERC has violated this Court's decision in *New York* v. *FERC*, which expressly held that the Federal Power Act ("FPA") "limit[s] FERC's *sale* jurisdiction to that at wholesale." *Id.* at 17 (emphasis added); *accord id.* at 23-24. Accordingly, this case represents one of those rare instances in which both the agency and the lower court have simply refused to follow a controlling decision of this Court. Plenary review is warranted on that basis alone.

2. In light of FERC's prior concession that the sale of station power is a retail sale of electricity,[2] it is baffling that FERC now suggests (at 12) that the transactions here constitute "wholesale sales." FERC tried to make the same claim at oral argument in the Court of Appeals, but the Court of Appeals correctly held that "neither in its brief nor in the

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¶ 61,248 (1997), *order on reh'g*, Order 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[2] Notably, Competitive Generators contend that FERC has jurisdiction over retail station power sales (Gen. Opp. (i), 14-15), a point which FERC itself has conceded. Accordingly, the Competitive Generators' brief adds nothing of substance to the jurisdictional debate presented by this case.

orders below has FERC asserted that its jurisdiction to order station power netting is founded on its statutory jurisdiction over wholesale sales." Pet. App. 9a n.7.[3] Thereafter, in its opposition to Petitioners' rehearing petition in the Court of Appeals, FERC conceded that this statement from the Court of Appeals' opinion was correct. Pet. App. 342a.

Now, FERC has apparently reverted to this argument as a way to suggest (at 12) that the issue here is "essentially one of line drawing," that is, that FERC is simply attempting to draw a reasonable line between wholesale sales, over which it has jurisdiction, and retail sales, over which the States have jurisdiction. However, what FERC is actually doing is using its method of measuring transmission (its 30-day "netting" approach) to draw a line between self-supply (which, according to the FERC, does not involve a sale) and retail sales of station power, despite its admission that it does not have jurisdiction over *either*. Pet. App. 315a. It is no wonder the Court of Appeals found FERC's rationale "a bit confusing." Pet App. 9a.

FERC's earlier concessions that only retail sales, not wholesale sales, were implicated here should have been the end of this case under the interpretation of the FPA adopted by this

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[3] In its Court of Appeals' Brief (at 14, citations omitted), FERC admitted that "[t]hird-party supply, unlike self-supply, is a retail sale that is subject to state regulation." FERC nevertheless attempted to escape this conclusion by attempting to define sales of station power from the grid to merchant generators as "momentary instances of negative net output" and "fluctuations in electric production," *id.* at 49-50 (citing *PJM Interconnection, L.L.C.*, 94 FERC ¶ 61,251, at 61,892, *reh'g denied*, 95 FERC ¶ 61,333 (2001), *order on reh'g*, 95 FERC ¶ 61,470 (2001)). As indicated in the text, the Court of Appeals correctly understood that FERC was not relying on its jurisdiction over wholesale sales or transmission for its actions here. Pet. App. 9a n.7. Under FERC's monthly netting methodology, such "momentary instances" can comprise substantial portions of the month in question.

Court in *New York v. FERC*.[4] FERC's attempt to escape that conclusion through an argument that it conceded below to be incorrect only heightens the need for this Court's review.

3. FERC also suggests (at 8) that its decision can be justified as an exercise of its authority to remedy "discrimination." Yet, the Court of Appeals did not rely upon FERC's discrimination-remedying authority as a basis for sustaining FERC's jurisdiction. FERC is simply wrong in suggesting that any untoward discrimination exists here.[5] FERC's argument begs the question whether it has jurisdiction to address or remedy alleged discrimination in the sale of electricity that is otherwise subject to a State's exclusive jurisdiction.

FERC has no such jurisdiction. As this Court has squarely held, FERC's discrimination-remedying authority is expressly

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[4] This result follows not only from FPA Section 201, 16 U.S.C. § 824 but also FPA Section 212(h), 16 U.S.C. § 824k(h). The latter provision, with certain exceptions not applicable here, prohibits FERC from mandating delivery "to, or for the benefit of, an entity if such electric energy would be sold by such entity directly to an ultimate consumer." Pet. App. 269a. Section 212(h), therefore, precluded FERC from intruding on New York State's exclusive authority over retail sales of electricity within the State. Yet the Court of Appeals did not address Petitioners' Section 212(h) argument, despite it having been raised by Petitioners in both their briefs and on rehearing. *See, e.g.*, Pet. App. 338a-340a.

FERC's Opposition (at 12-13 n.3) effectively recognizes the Court of Appeals' failure to address Petitioners' Section 212(h) argument by claiming the argument is "derivative of" Petitioners' argument that monthly netting is no different, conceptually, than hourly netting, without citing to or relying on the Court of Appeals' decision for that proposition. FERC does not dispute, however, that Section 212(h) is an explicit Congressional bar to FERC's action, and the Court of Appeals' failure to adhere to that provision (or even address it) provides yet another powerful reason for this Court's review.

[5] There is no evidence in the record of discrimination, and there could be none, because merchant generators and the New York public utilities are not similarly-situated as the government recognizes (at 3) due to the New York public utilities' divestiture of generation as part of retail restructuring. Pet. Reply Br. 29-33.

confined to matters "with respect to any transmission or sale *subject to the jurisdiction of the Commission.*" *New York v. FERC*, 535 U.S. at 6-7 (emphasis added) (citation omitted); *see* FERC Opp. at 8 (same). Because FERC lacks jurisdiction over retail sales of power, it has no authority to address any supposed discrimination with respect to such sales, whether or not they are made in connection with interstate transmission. Remedying such discrimination, where it occurs, is within the authority of the States, not the FERC. *See, e.g.*, N.Y. Pub. Serv. Law §§ 65 and 66 (Consol. 2006). FERC's contrary suggestion heightens the need for this Court's review.

4. Finally, FERC does not dispute that, if its present interpretation of the FPA is incorrect (and it is), its decisions represent an enormous intrusion into the States' prerogatives under the FPA. Station power consumption by generators is generally estimated at approximately 2-5% of gross generation nationally and is worth billions of dollars a year. The national importance of this case is underscored by the presence of the Competitive Generators, who own generating plants across the United States.[6]

Here, the New York Public Service Commission ("NYPSC") determined that pricing of retail sales and local delivery service for station power based on use during an hour or a quarter-hour is appropriate, as a policy matter. FERC did not have authority under the statute or *New York v. FERC* to override the State's policy choice and to dictate the applicable measurement period for prices or services subject to State

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[6] *See* Gen. Opp. *See also* other pending station power cases before the D.C. Circuit, including *Consolidated Edison Co. of New York, Inc. v. FERC*, D.C. Circuit No. 05-1372 (case stayed pending resolution of the Petitioners' petition for writ of certiorari in Case No. 06-1010 and 06-1011); *Consolidated Edison Co. of New York, Inc. v. FERC*, D.C. Circuit No. 06-1360 (case stayed pending resolution of the Petitioners' petition for writ of certiorari in Case No. 06-1010 and 06-1011); and *Southern California Edison Co., et al. v. FERC*, D.C. Cir. Nos. 05-1327, *et al.* (case held in abeyance).

jurisdiction. FERC also lacked authority to authorize wholesale generators simply to *ignore* charges under State-approved tariffs for the sale and delivery of station power. *See* NYPSC Pet. 9-10, 19-20. Such an incursion into the States' authority is by itself a compelling reason for plenary review.

B. The Court of Appeals' reliance upon a supposed concession as a basis for finding jurisdiction conflicts with this Court's precedents, conflicts with decisions of other circuits and State supreme courts, and only enhances the suitability of this case as a vehicle for resolving the underlying jurisdictional issue.

Instead of adhering to the statute and this Court's precedents, the Court of Appeals found jurisdiction on the basis of a supposed *concession* by counsel at oral argument. Pet. App. 9a-11a. FERC does not dispute that an exercise of jurisdiction based upon counsel's concession is contrary to the fundamental principle that the "[p]arties . . . cannot confer jurisdiction" on an agency, "only Congress can do so." *Weinberger v. Bentex Pharmaceuticals Inc.*, 412 U.S. 645, 652 (1973); *see also* Pet. 17-18; NYPSC Pet. 13-14. Nor does FERC dispute that such a holding would be in square conflict with decisions of other circuits and various state supreme courts. *See id.*; NARUC/State *Amicus* Br. 8-11. FERC makes only a half-hearted attempt (at 14-15) to defend the Court of Appeals' conclusion that petitioners even conceded what the Court of Appeals said they conceded, *i.e.*, that FERC had *jurisdiction* over station power sales, as opposed to conceding that an hourly netting procedure is reasonable for services, such as transmission, that are within FERC's jurisdiction.[7]

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[7] NYPSC Counsel made clear that one-hour netting was appropriate because the State of New York had determined it to be so, as a matter of state law. Pet. App. 10a. That hardly means that FERC somehow has the authority to determine that some other (*i.e.*, monthly) netting period would

1. Instead, FERC now tries to rewrite the Court of Appeals' decision. FERC suggests that the Court of Appeals did not really *rely* upon petitioners' supposed concessions as a basis for sustaining FERC's jurisdiction, and thereby ousting the State's jurisdiction, but instead simply "understood petitioners' [alleged] concession as undermining the logic of their argument." Opp. 14-15.

That may be what FERC now wishes the Court of Appeals had held, but that is not what the Court of Appeals actually held. As explained above, the Court of Appeals did not rely upon any of the arguments that FERC now asserts as a basis for sustaining FERC's jurisdiction and (implicitly) rejecting State jurisdiction and found the only rationale FERC offered unconvincing. Instead, the *only* basis the court gave for rejecting petitioners' challenge to FERC's jurisdiction was "their clear concession that an hourly netting tariff would not violate the Act—which is a recognition that, in drawing the jurisdictional lines in this area, some practical accommodation is necessary." Pet. App. 9a. No other basis for sustaining the FERC's jurisdiction was offered.

Because the Court of Appeals so clearly relied upon a supposed concession as its basis for sustaining FERC's jurisdiction, that decision, as explained above and in the petitions, squarely conflicts with this Court's precedents as well as decisions in other circuits and various state supreme courts. Those conflicts amply warrant this Court's plenary review.

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be appropriate for services over which it lacks jurisdiction. Yet that is what the Court of Appeals held. Pet. App. 11a. The Court's decision is even more puzzling given that, in so ruling, it pointed to a pleading in the underlying FERC proceeding which made clear that the utility petitioner only supported hourly netting for purposes of FERC transmission pricing and clearly opposed FERC's attempt to impose any measurement period for state jurisdictional services. Pet. App. 9a; Pet. App. 29a; Pet. App. 344a.

2. Similarly, the existence of petitioners' concessions — whatever their nature—does not, as FERC contends (at 14), make this case "a poor vehicle" for resolving the fundamental question of state-federal jurisdiction presented here. For one thing, as the NARUC/State *amicus* brief cogently explains (at 8-10), not even the lawyers for the NYPSC have the authority to waive the State's jurisdiction. It follows *a fortiori* that lawyers for the *private* petitioners had no authority to consent to FERC's jurisdiction and thereby deny jurisdiction to the State. It would thus be contrary to settled principles of federalism to deprive the State of an opportunity to reestablish its jurisdiction through a decision of this Court based upon any supposed concession below.

Moreover, as explained in the petitions and by the NARUC/State *amici*, the Court of Appeals' holding that a federal agency's jurisdiction can be sustained on the basis of a mere concession is contrary to the precedents of this Court and numerous other courts across the Nation. This aspect of the decision below enhances, rather than detracts from, the attractiveness of this case as a vehicle for resolving the jurisdictional issue presented here, for it provides the Court with an opportunity to remind the lower courts of the fundamental principles that the Court of Appeals disregarded when it relied upon the supposed concessions as a basis—the sole basis—for sustaining FERC's jurisdiction.

C. The Court of Appeals' decision to find jurisdiction while acknowledging that the agency had not established a sufficient basis for it conflicts with this Court's precedents and presents the same issue as the *Defenders of Wildlife* cases currently before the Court.

FERC's opposition neither addresses, nor disputes petitioners' final reason for plenary review of the Court of Appeals' decision on the scope of FERC's jurisdiction. That is the Court of Appeals' decision to address and decide that

question itself despite its acknowledgment that the agency had given a "jurisdictional rationale" that "is a bit confusing," and "has not clearly articulated why that jurisdiction permits" the actions at issue here. Pet. App. 9a. That, as the petitioners showed, is contrary to the bedrock principle of *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943), namely, that a court may not rely upon a *post hoc* rationale for affirmance of an agency's action. Pet. 15-17. And that principle is particularly important where, as here, the agency's assertion of jurisdiction necessarily displaces the State's jurisdiction over the same transactions. *Id.* at 15; NYPSC Pet. 18-19. Again, FERC's opposition neither disputes that principle nor contests its application here.

Nor does FERC deny that this Court has essentially directed the parties in *National Ass'n of Home Builders v. Defenders of Wildlife* and *EPA v. Defenders of Wildlife*, Nos. 06-549 and 06-340, 75 U.S.L.W. 3349, ___ U.S. ___, 127 S. Ct. 852, 127 S. Ct. 853 (2007), to address the application of that same principle in an analogous context—there, a court's attempt to reconcile an ambiguity in the Environmental Protection Agency's interpretation of a federal statute rather than remanding to the agency for resolution of that ambiguity in the first instance. Similarly here, one of the discrete questions presented is whether the Court of Appeals, rather than supplying its own rationale for FERC's assertion of jurisdiction, should have vacated and remanded FERC's decisions for a clear articulation of the agency's own basis for asserting jurisdiction. *See* Pet. (i). The Court should grant review of that question as well as the broader question of the FERC's jurisdiction over station power or, alternatively, hold these petitions pending decision in the *Defenders of Wildlife* cases.

CONCLUSION

The petitions should be granted or, at a minimum, held pending decision in Nos. 06-340 and 06-549.

Respectfully submitted,

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